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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID RAYMOND SOMERS,

Defendant and Appellant.

A154312

(Sonoma County Super. Ct. Nos.
SCR7106361, SCR666597)

Following a jury trial, defendant David Raymond Somers was convicted of driving under the influence with a blood alcohol content (BAC) of .15 percent or higher (Veh. Code, §§ 23152, subd. (a), 23578),¹ driving with a BAC of .08 percent or higher (§§ 23152, subd. (b), 23578), and driving with a suspended or revoked license for a DUI conviction (§ 14601.2, subd. (a)). On appeal, defendant challenges the denial of his motion to suppress statements he made to police officers without *Miranda*² advisements. We affirm.

BACKGROUND

The trial court denied defendant's motion to suppress after an Evidence Code section 402 hearing. While ordinarily we would focus on the testimony given at that hearing in evaluating the trial court's ruling on the motion, as we explain below, we need

¹ All further statutory references are to the Vehicle Code unless otherwise indicated.

² *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

not, and do not, decide whether the motion was properly denied, since even if defendant should have received *Miranda* advisements and the statements should have been suppressed, any error in denying the motion was harmless. We therefore summarize only the evidence at trial.

The prosecution called as witnesses two individuals who were at the scene of the incident. The first, Mark Johnson, arrived at the scene, a self-storage facility, to visit his sister, who was the manager of the facility. When Johnson arrived, he saw a van parked at the front vehicle gate, and the driver was talking through a speaker at the entrance. After a few seconds, Johnson decided to park his own car outside the facility and walk in through a pedestrian gate. As Johnson was walking through the pedestrian gate, he saw the vehicle gate open and heard a “metal crunching” sound. Although Johnson initially testified the sound occurred when the van hit a post as the driver was backing up to enter the facility, he subsequently acknowledged he was not actually looking at the van when the crunching noise occurred. Johnson continued walking into the facility when he heard a second noise—a “bang.” He turned again, and at that point, he saw the van enter the facility. Johnson subsequently “saw the gate was bent,” and he testified the second sound was “from the van hitting . . . the gate.” Johnson then watched the van continue into the facility. He could see the driver, who he identified as the defendant. When asked if he could tell whether defendant was impaired, Johnson said he “couldn’t make a fair judgment.” But he called the situation “strange,” since the van had been parked at the entrance “askew.”

Terry Hemenes was the second eyewitness. She is Johnson’s sister and the on-site manager of the facility, and was in her on-site apartment, adjacent to the facility office. She heard a bang, walked into the office, and saw Johnson. Johnson exclaimed, “that guy hit the gate.” Hemenes continued walking outside where she saw defendant through the driver’s side window, in his van, about 30 feet away. She recognized defendant because he was a tenant. Defendant was driving about five miles an hour towards his storage space and parking spot. Hemenes followed the van and saw it turn a corner, headed towards defendant’s unit and parking spot. She walked over to defendant while he was

still in the van and said, “ ‘hey, David, you hit my gate.’ ” Defendant’s sole response was “ ‘huh, what.’ ” She then said, “ ‘David, you’re drunk,’ ” to which defendant made no response. In Hemenes’s estimation, defendant was “highly intoxicated” because he was slurring his words and “not very coherent.” Her verbal interchange with defendant lasted about two minutes. Hemenes did not see defendant drinking alcohol, nor could she see any alcoholic beverage containers in the van.

While Hemenes was still standing next to the van, she called her manager to ask what to do. The phone call lasted under a minute, and her manager told her to call the police, which she did immediately. She estimated she made the call to the police about 10 minutes after the “accident” occurred. Hemenes was shown a security incident report based on the “gate access log” she had filled out at the time. The report indicated the “accident” occurred at 2:10 p.m. Hemenes then walked back to the entrance of the facility. She also testified there is a liquor store across the street from the facility.

The responding officer, Officer Whitten, also testified. He responded to a dispatch call at 2:47 p.m. of a driver under the influence at the storage facility. Officer Whitten arrived at the facility at 3:14 p.m.

Officer Whitten found defendant in his van, parked at the facility. “He was, by all intents and purposes, based on my investigation, incredibly intoxicated.” Defendant had bloodshot eyes, his speech was slurred, and he had a “strong odor of an alcoholic beverage.” Officer Whitten asked a number of questions, one of which was whether defendant had been driving, to which the defendant replied “no.” Officer Whitten also asked defendant if he had “consumed any alcohol that day,” and he again said “no.”

Officer Whitten then commenced a formal DUI investigation. He first attempted to search defendant for weapons and illegal substances. However, defendant was so wobbly Officer Whitten was afraid he might fall over during the search, so Whitten placed him in handcuffs. Officer Whitten told defendant he was being handcuffed for his own safety. After the search, Officer Whitten had defendant sit on the hood of his patrol vehicle to prevent him from falling over. Officer Whitten again asked defendant if he had anything to drink because he smelled strongly of alcohol, and defendant denied

drinking. Officer Whitten then attempted the Horizontal Gaze Nystagmus field sobriety test, which requires an individual to focus on a moving object. Defendant was unable to follow the object. Officer Whitten next asked “an array of field sobriety test questions.” These included asking defendant if he recently ate or slept; defendant’s responses were either unintelligible or “very quick one-word responses.”

Officer Whitten also asked (again) whether defendant had been driving, to which defendant replied he had been driving from home. After finding an open, half-full bottle of vodka in defendant’s vehicle, he asked defendant if he had been drinking vodka. Defendant replied “only vodka.” Officer Whitten next asked defendant if he had been drinking alcohol since hitting the gate, whereupon defendant said, “he had not been drinking alcohol since hitting the gate.”

Because defendant still appeared unstable, a second officer placed him in the back of Officer Whitten’s patrol car. Officer Whitten then had defendant provide a breathalyzer sample (at 3:45 p.m.), which showed a blood alcohol content (BAC) of .328. At this point, Officer Whitten placed defendant under arrest. Before leaving the scene, Officer Whitten had defendant blow two more breathalyzer samples, which yielded a .32 and .31 BAC at 3:56 p.m. and 3:59 p.m., respectively. The total encounter lasted about 45 minutes.

Officer Whitten’s body cam was on during the encounter and was admitted into evidence. It showed Officer Whitten finding a bottle of vodka between the front seats of the van as he searched the vehicle. It also showed the bottle was about half-empty.

Criminalist Anthony Valerio testified as an expert in forensic alcohol analysis. He testified the breathalyzer machine was working properly at the time in question. He further explained alcohol “vaporiz[es] out of the mouth” within 15 minutes, and a breathalyzer accurately records BAC after that time. He also testified most people’s BAC climbs by .02 for every 1.25 ounces of 80-proof alcohol they drink, and declines .02 an hour. For a 185 pound male, like defendant, to reach a BAC level of .32, he would have to drink 20 ounces of 80-proof alcohol. The bottle of vodka found in defendant’s van was a 25.36-ounce bottle. Valerio testified that, based on defendant’s BAC of .31

tested at about 4:00 p.m., that approximately two hours earlier, at 2:00 p.m., defendant's BAC would have been .35. To reach that level of intoxication, a 185-pound male would need to consume about 17.5 shots, consisting of 1.25 ounces of 80-proof liquor.

The jury convicted defendant on all charges, and the trial court sentenced him to an aggregate prison term of three years and eight months. The court also found defendant in violation of his probation in a prior DUI case.

DISCUSSION

Defendant maintains that upon being placed in handcuffs he was under arrest and everything that followed was a custodial interrogation in violation of *Miranda*. Specifically, his defense theory was that he arrived at the storage facility sober, drove to his parking spot, and then proceeded to drink until the officer arrived, at which point he was, indeed, intoxicated. He therefore maintains two statements he made to Officer Whitten were "an important part of the state's case." The first was his statement that he had driven to the facility from home. The second, his statement "he had not been drinking alcohol since hitting the gate."

As we stated at the outset, we need not, and do not, decide whether defendant was under arrest for purposes of *Miranda* (as to which we have considerable doubt), as any error in allowing the two statements was harmless.

In evaluating whether *Miranda* error was prejudicial, we apply the *Chapman*³ standard. (*People v. Elizalde* (2015) 61 Cal.4th 523, 542). We therefore review the entire record to determine whether, beyond a reasonable doubt, the error complained of contributed to the verdict obtained. (*Ibid.*) "Under this standard, the evidence that remains after" defendant's "statements are excluded must not only be sufficient to support the verdict, but must overwhelmingly establish his or her guilt beyond a reasonable doubt." (*People v. Villasenor* (2015) 242 Cal.App.4th 42, 69.) The evidence in this case amply satisfies this standard.

³ *Chapman v. California* (1967) 386 U.S. 18, 24.

As we have recited, two eyewitnesses testified to the events in question. Johnson testified to seeing defendant's van parked askance at the entrance to the storage facility, heard two crashing sounds in the immediate vicinity of the van, including one as the van was driving through the vehicle entrance. Johnson also saw the damaged entry gate. Hemenes also heard the second "bang," whereupon she left her apartment, and went to the office where she saw Johnson, who told her the van had just crashed into the entrance gate. She then went outside, where she saw defendant in the van and walked behind the vehicle as he drove towards his storage unit. Hemenes walked up to defendant, who was still in the van, and had a verbal exchange with him. Defendant exhibited all the signs of being "highly intoxicated," and he did not deny either her accusation that he was intoxicated or that he had hit the entrance gate.

Officer Whitten corroborated Hemenes's testimony. The officer found defendant in his van, clearly intoxicated—defendant's eyes were bloodshot, his speech was slurred, and he reeked of alcohol. He could barely stand on his own. He failed every field sobriety test. And the first breathalyzer results showed a staggering .328 BAC.

In addition, the criminalist explained that for a male of defendant's weight to reach a BAC of .32, he would have to drink 20 ounces of 80-proof alcohol. The only alcohol found in the van, however, was a 25.36 ounce bottle of vodka that was half-full, and defendant had nothing to drink between the time Officer Whitten arrived at 3:14 p.m. and the time of the first breathalyzer test at 3:45 p.m. Therefore, it could readily be inferred defendant had to have consumed half of the required alcohol to register a .32 BAC before he got to the facility, and the eyewitness testimony confirmed he was in a highly intoxicated state when he arrived at the facility. Indeed, the criminalist calculated that, based on a .31 blood alcohol content at about 4:00 p.m., that defendant would have had a .35 blood alcohol content at 2:00 p.m.

Defendant asserts there were discrepancies in Johnson's and Hemenes's testimony and the jury would have discounted their testimony had his two challenged statements—that he had been driving, and had been drinking, before entering the storage facility—not been admitted. He points out, for example, that Johnson told Officer Whitten at the scene

that he did not know defendant hit the vehicle entry gate until Hemenes told him, whereas, at trial, Johnson testified he heard the bang and it came “from the van hitting . . . the gate.” This can hardly be called a discrepancy, and at best, was a minor one. Defendant also takes issue with Hemenes’s testimony that she called the police within about 10 minutes of the accident, while the facility records stated defendant entered the facility at 2:10 p.m. and the police call records showed the call at 2:47 p.m. However, Hemenes’s initial time estimate was not significantly off the mark. And it does not, in any case, detract from Hemenes’s testimony that defendant was highly intoxicated when he entered the facility. Furthermore, Johnson’s and Hemenes’s testimony was corroborated by what Officer Whitten saw at the scene, and by the criminalist’s testimony. Defendant does not take issue with Officer Whitten’s testimony as to what he saw and did at the scene. Defendant does, however, complain that the criminalist’s testimony was suspect because it supposedly was “unknown” whether defendant had more to drink than the half bottle of vodka found in the van. But given all the evidence, it was eminently reasonable to infer that defendant did, indeed, drink more than the half-bottle of vodka and did so, moreover, before he arrived at the storage facility.

In short, defendant has not identified any discrepancy in Johnson’s or Hemenes’s testimony that remotely suggests the jury would have given their testimony little or no weight had defendant’s statements to Officer Whitten been excluded. Rather, defendant is simply rearguing witness credibility and the weight of the evidence—matters committed to the jury and not properly decided by an appellate court. (See *People v. Thompson* (2010) 49 Cal.4th 79, 125 [rejecting “defendant’s attempt to reargue the evidence on appeal” and reiterating “ ‘it is not a proper appellate function to reassess the credibility of the witnesses’ ”].)

Given the overwhelming evidence supporting the convictions, any supposed error in allowing the two challenged statements was harmless beyond a reasonable doubt.

DISPOSITION

The judgment is affirmed.

Banke, J.

We concur:

Humes, P.J.

Margulies, J.

A154312, *People v. Somers*